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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RICHARD GRAFF,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an ordinance requiring an operator of a newsstand to obtain a permit to erect a stand on public property should be analyzed as a prior restraint.

2. Whether the City of Chicago's newsstand ordinance, which requires applications for newsstand permits to be considered within a specified period of time under a set of six binding criteria, and which affords applicants prompt judicial review of adverse decisions, is an invalid prior restraint.

3. Whether the six binding criteria for evaluating applications for newsstand permits under the City of Chicago's newsstand ordinance confer such broad discretion on municipal officials that the ordinance should be considered an invalid prior restraint.

4. Whether an ordinance regulating newsstands that is found to be consistent with the First Amendment must nevertheless be subjected to heightened scrutiny under the Equal Protection Clause on the basis that it affects a fundamental right.

5. Whether the district court should have held an evidentiary hearing on whether the City of Chicago's ordinance regulating the number and size of newsstands within the City, and the activities that may be conducted at newsstands, in fact advances legitimate interests in regulating the time, place, and manner of activities on the public ways.

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit sitting en banc, Pet. App. 1-79, is reported at 9 F.3d 1309. The opinion of the panel of the court of appeals, Pet. App. 80-136, is reported at 986 F.2d 1055. The memorandum opinion and order of the United States District Court for the Northern District of Illinois, Pet. App. 137-54, is reported at 800 F. Supp. 576.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1993. On February 10, 1994, Justice Stevens entered an order granting petitioner an additional 30 days in which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner Richard Graff ("Graff") operates a newsstand on public property in front of the City of Chicago's Cultural Center. Since Graff bought the newsstand in 1984, he has never held a permit to operate it. Graff applied for a permit several times thereafter, and each time the City informed him that it would not issue any permits because its newsstand ordinance was under review.[1] In 1990, Graff filed this lawsuit challenging the City's refusal to issue him a permit. Some four months later, the Chicago City Council enacted the ordinance at issue.

The City's new newsstand ordinance requires all newsstands on unenclosed municipal property to have a permit. See Municipal Code of Chicago, Ill. § 10-28-130 (1991).[2] The ordinance limits the size of newsstands (see *id.* § 10-28-170) and requires them to observe set-back rules from parkways and display windows and to leave at least six feet of pedestrian passage on the sidewalk (see *id.* § 10-28-185(b)). Newsstands must be used solely for "the exhibition and sale of newspapers, periodicals, and similar publications." *Id.* § 10-28-180.

Permits under the ordinance are issued by the City's Commissioner of Public Works. The Commissioner has authority to issue as many permits as were in existence on the effective date of the ordinance. See Municipal Code of Chicago, Ill. §§ 10-28-130 & -135 (1991). The Commissioner must act on a permit application within 65 days. See *id.* § 10-28-160(c). If an application is denied, the applicant has 10 days to seek reconsideration at a formal hearing; the Commissioner then has 30 days to

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[1] The ordinance then in effect left the decision whether to issue a permit for a newsstand to the unfettered discretion of the City Council, and the decision whether to revoke a permit to the unfettered discretion of the Mayor. See Pet. App. 2.

[2] The ordinance can be found at Pet. App. 157-69.

hold a hearing. See *ibid.* In evaluating a permit application, the Commissioner must decide on the basis of six criteria:

> (1) Whether the design, materials and color scheme of the newsstand comport with and enhance the quality and character of the streetscape, including nearby development and existing land uses;
>
> (2) Whether the newsstand complies with this Code;
>
> (3) Whether the applicant has previously operated a newsstand at that location;
>
> (4) The extent to which the services that would be offered by the newsstand are already available in the area;
>
> (5) The number of daily publications proposed to be sold from the newsstand; and
>
> (6) The size of the stand relative to the number of days the stand will be open and operating.

Id. § 10-28-160(b).[3]

Once an applicant receives a permit, it is entitled to have the permit renewed annually so long as the newsstand remains in compliance with the ordinance. See Municipal Code of Chicago, Ill. § 10-28-160(b) (1991). A permit may be revoked only if the newsstand violates the rules contained in the ordinance, if it has been abandoned, if the owner permits it to be used for illegal purposes, if it is determined that the permit holder submitted false information in its permit application, or if the permit holder fails to erect a lawful newsstand within 90 days of the issuance of the permit. See *id.* § 10-28-190.

Graff amended his complaint to attack the new ordinance as facially unconstitutional and sought a prelimi-

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[3] An application for a newsstand to be located on property with a designated landmark must also be approved by the Commission on Chicago Historical and Architectural Landmarks under the criteria applicable to it. Municipal Code of Chicago, Ill. § 10-28-160(a).

nary injunction preventing the City from removing his newsstand at the Cultural Center. See Pet. App. 137. The district court dismissed the counts of Graff's complaint attacking the new ordinance and denied his request for preliminary injunctive relief as moot. The court concluded that the ordinance should be analyzed as a regulation of the time, place, and manner of speech, and that, as so analyzed, the ordinance contained reasonable regulations for the operation and maintenance of newsstands. Pet. App. 138-53.

Graff appealed the denial of his motion for an injunction, and a divided panel of the court of appeals reversed.[4] The panel majority first concluded that the First Amendment secures the right to place a structure on the public way to sell periodicals and other materials protected by the First Amendment. Pet. App. 87-93. Second, the majority concluded that the ordinance constituted a prior restraint because the Commissioner might not follow the criteria in the ordinance, but instead could use them as a pretext for content discrimination. Pet. App. 96-98. Finally, the majority concluded that this prior restraint was not accompanied by adequate procedural safeguards, because although dissatisfied applicants could obtain judicial review in state court, the possibility of subsequent review was not sufficient to circumscribe adequately the Commissioner's discretion. Pet. App. 99-100. Judge Manion filed a lengthy dissent. Pet. App. 110-36.

The City sought and obtained rehearing en banc, and the en banc court affirmed the judgment of the district court by a vote of 9-3. Writing for a 5-judge plurality, Judge Manion concluded, first, that prior restraint doctrine was not implicated by this case because Graff had no protected right to erect a structure on public property and

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[4] The panel concluded that it had jurisdiction over Graff's appeal under 28 U.S.C. § 1292(a)(1) (see Pet. App. 82-85), a conclusion the en banc court embraced as well (see Pet. App. 6-7).

hence the City had restrained nothing that is protected by the First Amendment (Pet. App. 8-17); second, that the criteria in the ordinance sufficiently cabined the Commissioner's discretion (Pet. App. 17-21); third, that the restrictions in the ordinance constituted reasonable regulations of the time, place, and manner of expressive activity (Pet. App. 22-29); fourth, that the limitations on the time during which an application may remain pending and the availability of prompt judicial review of applications that were denied provided adequate procedural safeguards on the application process (Pet. App. 32-38); and fifth, that the ordinance comported with equal protection because it infringed no fundamental First Amendment right and contained reasonable regulations for newsstands (Pet. App. 38-41). Judge Flaum, joined by Judge Cudahy, concurred in the result, concluding that although the ordinance was appropriately analyzed under prior restraint doctrine, it was valid because the ordinance sufficiently cabined the discretion of municipal officials and contained appropriate procedural safeguards. Pet. App. 43-58. Judge Ripple, joined by Judge Cudahy and Judge Rovner, also concurred in the result, concluding that when, as here, an ordinance does not grant unbridled discretion to a municipal licensing official, it should be analyzed as a regulation of the time, place, or manner of speech, rather than as a prior restraint. Pet. App. 59-64. Judge Cummings, joined by Judge Bauer and Judge Fairchild, dissented. Pet. App. 65-79.

ARGUMENT

Although the City of Chicago has chosen not to prohibit newsstands on public property, neither do we choose to permit their erection anywhere within the City by anyone interested in operating a rent-free store on public property. The City's ordinance reflects instead a middle ground, permitting newsstands on public property only if an applicant can demonstrate that it satisfies content-neutral criteria for determining where and how newsstands may operate. Graff strains to shoehorn his case into First Amendment prior restraint doctrine, but that shoe will not fit. Graff has no right to erect a store on public property merely because he plans to sell materials that are protected by the First Amendment there; hence the ordinance "restrains" nothing that is protected by the First Amendment. In any event, because the ordinance contains substantial limitations on the discretion of licensing officials and substantial procedural safeguards that accompany the exercise of that discretion, it passes muster even if analyzed under prior restraint doctrine. The ordinance's limitations on the size, placement, and number of newsstands have no impact on what ideas or views may be disseminated within the City of Chicago and are an appropriate regulation of the time, place, and manner of expressive activities. These reasonable regulations are consistent with the First Amendment. Absent any infringement of a fundamental right, the ordinance comports with the Equal Protection Clause as well.

Graff identifies no decision of this Court that grants him a right to erect a store on public property without seeking advance permission, nor any decision that condemns the type of circumscribed discretion conferred upon the Commissioner under this ordinance. Nor does Graff identify any decision of another circuit even close to being on point, much less one that reaches a result inconsistent with that reached below. While the Seventh Circuit's well-reasoned discussion of the law of prior restraint will no doubt prove useful to other courts, the

decision below makes no new law, creates no conflict in the circuits, and ultimately turns on the highly specific details of the particular ordinance at issue. There is thus no basis for plenary review by this Court.

1. Graff mischaracterizes the conclusion of the plurality below when he argues that the plurality "decided that the First Amendment is not implicated in this case because: '[t]he building of a newsstand is simply not a form of constitutionally protected expression.'" Pet. 9 (quoting Pet. App. 10-11). To the contrary, the plurality's opinion contains an extensive discussion of the First Amendment standards that it concluded were applicable to the ordinance. See Pet. App. 17-38. The plurality held only that "[r]equiring a permit for the structure is not a prior restraint on speech." Pet. App. 10. That ruling is plainly correct because the First Amendment's guarantee of freedom of speech does not secure for Graff a right to erect a newsstand on public property.

The First Amendment presumptively protects the right to speak or demonstrate on the public ways (*e.g., United States v. Grace*, 461 U.S. 171, 176-78 (1983)), as well as the right of persons to engage in communicative activities regardless of the content of the communication (*e.g., Texas v. Johnson*, 491 U.S. 397, 406-07 (1989)). Thus, an ordinance requiring prior governmental approval of the content of communication before one may engage in activities protected by the First Amendment is properly characterized as a prior restraint. See, *e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (ordinance requiring license to engage in public demonstrations); *Freedman v. Maryland*, 380 U.S. 51 (1965) (statute requiring license before exhibiting a movie). Such ordinances "restrain" the exercise of some right protected by the First Amendment. But this is not such an ordinance. This ordinance requires prior governmental approval to erect a permanent structure. This Court has squarely rejected the claim that requiring a permit before a business can open amounts to a prior restraint when that business

plans to engage in expressive activities. In *Young v. American Mini-Theatres*, 427 U.S. 50 (1976), the Court held that an ordinance requiring licenses to open adult movie theatres was not a prior restraint: "The mere fact that commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances . . . . The City's interest in planning and regulating the use of property for commercial purposes is clearly adequate to afford that kind of restriction . . . ." *Id.* at 62-63. This Court has never held that the First Amendment protects the right to erect a permanent structure on public property, nor has it applied prior restraint doctrine to ordinances regulating those who seek to place their expressive materials on public property. Rather, the Court has examined such limitations on the use of public property as regulations of the time, place, or manner of speech. See, *e.g.*, *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *Members of Los Angeles City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

In arguing that this ordinance should be analyzed as a prior restraint, Graff relies on *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). That case considered an ordinance that required permission from the city's mayor to place newspaper vending machines on public property. The Court held that the ordinance was invalid because it contained no neutral standards governing the issuance of permits, not because it was a "prior restraint." See *id.* at 757-59, 769-70. The precise holding in *Lakewood* was that the ordinance could not be upheld as a content-neutral time, place, or manner regulation because it afforded "unbridled discretion" to the mayor. See *id.* at 762-68. *Lakewood* is not authority for the proposition that an ordinance prohibiting the placement of structures on public property without advance permission that is granted or withheld pursuant to content-neutral criteria "restrains" anything that is pro-

tected by the First Amendment; indeed the Court expressly declined to decide whether the First Amendment protects the right to place newspaper vending machines on public property. See *id.* at 762 n.7.[5]

Here, as we explain below, the ordinance at issue does not grant "unbridled discretion" to the Commissioner, and hence does not run afoul of *Lakewood*. The courts of appeals have consistently analyzed ordinances that contain specified criteria governing the exercise of discretion as regulations of the time, place, and manner of speech, and not as prior restraints. See, *e.g.*, *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 577-78 (9th Cir.), cert. denied, 114 S. Ct. 306 (1993); *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319, 1326-28 (1st Cir. 1993); *Paulsen v. Gotbaum*, 982 F.2d 825, 828 (2d Cir. 1992); *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1134-36 (6th Cir.), cert. denied, 112 S. Ct. 275 (1991); *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1220-21 (10th Cir. 1990). Not surprisingly, then, Graff does not attempt to argue that the decision below is inconsistent with any other decision in the lower courts.

In any event, this aspect of the plurality's opinion was not material to the disposition of this case. The plurality went on to consider the ordinance under prior restraint doctrine and concluded that the ordinance was not an invalid prior restraint. See Pet. App. 17-21, 32-38. Moreover, two of the four concurring judges also concluded that the ordinance passed muster under prior restraint doctrine. See Pet. App. 43-58. Accordingly, the question whether prior restraint doctrine should be applied to this ordinance does not merit plenary review.

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[5] Moreover, as the Seventh Circuit plurality pointed out, even if *Lakewood* had decided this question with respect to newspaper vending machines, this ordinance would pose a very different question. Because newsstands are much larger than newspaper vending machines, they intrude more deeply on the legitimate governmental interest in avoiding undue obstruction of the public way, and thus they have a far weaker claim to public property. See Pet. App. 8-17.

2. Even if the City's newsstand ordinance is analyzed as a prior restraint, the ordinance would nevertheless be valid if it were accompanied by adequate procedural safeguards. See, *e.g.*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). In *Freedman v. Maryland*, the Court identified three safeguards that must accompany any regulation requiring issuance of a permit for the exhibition of a movie: first, any restraint may be imposed only for a specified brief period of time during which the status quo is preserved; second, prompt judicial review of the licensing official's decision must be available; and third, the licensing officials must bear the burden of going to court to obtain judicial review and must bear the burden of proof in judicial proceedings. See 380 U.S. at 58-60. Graff argues that the newsstand ordinance fails this test because "[t]here is no provision to ensure prompt judicial review of the administrative decision and no provision preserving the status quo." Pet. 16.

This submission ignores this Court's holding in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), which modified the *Freedman* test for cases like this one. *FW/PBS* involved a Dallas ordinance requiring adult-oriented businesses to obtain licenses before they could operate. A majority of the Court held that all three prongs of the *Freedman* test were unnecessary. *Freedman* was not controlling because under the Dallas ordinance no licensing official passed directly on the content of an applicant's speech, and because applicants seeking to go into business have adequate incentives to initiate judicial proceedings. See 493 U.S. at 229-30 (plurality opinion); *id.* at 245-48 (White, J., concurring in part and dissenting in part). A majority of the Court concluded that *Freedman* did not require the City to initiate judicial review or to preserve the status quo during review; that majority concluded that in the business licensing context, prior restraint doctrine requires, at the most, that there be a "[l]imitation on the time within which the licensor must issue the license as well as the availability of prompt

judicial review." *Id.* at 230; see also *id.* at 245-48 (White, J., concurring in part and dissenting in part).

The plurality below correctly applied the holding of *FW/PBS* to our newsstand ordinance. Under the ordinance, the Commissioner is not granted authority to review the content of periodicals distributed at a newsstand, and an applicant who wishes to obtain a permit in order to go into business has every incentive to seek judicial review promptly. Hence, as in *FW/PBS*, the First Amendment requires only a limitation on the time a permit application can remain pending and the availability of prompt judicial review. Here, the ordinance expressly limits to 65 days the time in which a permit application can remain pending; and Graff does not argue that the ordinance does not comply with this prong of *FW/PBS*. While Graff does complain that no "swift" judicial review is available (Pet. 16), he does not discuss the court of appeals' analysis of the availability of the common law writ of certiorari under Illinois law, which provides aggrieved applicants a judicial forum. See Pet. App. 36-38. Under Illinois law, decisions of municipal officials that are not expressly made reviewable by state law are reviewable of right by common law certiorari. *E.g.*, *Nowicki v. Evanston Fair Housing Review Board*, 338 N.E.2d 186 (Ill. 1975). This review "extends to all questions of law and fact presented by the record." *Howard v. Lawton*, 175 N.E.2d 556, 557 (Ill. 1961). A disappointed applicant thus may immediately seek a writ of certiorari, as well as any preliminary injunctive relief that may be warranted. Accordingly, swift and fully effective judicial review is available to disappointed applicants for newsstand permits. Graff identifies no decision of any lower court that is inconsistent with the decision below on this point.

Moreover, once again this aspect of the plurality's opinion was not necessary to the disposition of this case below. The plurality, as well as the four concurring judges, also concluded that the ordinance was not an

invalid prior restraint because it sufficiently cabins the Commissioner's discretion when reviewing applications. See Pet. App. 17-21 (plurality opinion), 47-58 (Flaum, J., concurring), 60-64 (Ripple, J., concurring).[6] Thus, the question whether the ordinance also complies with *Freedman* is not dispositive here, and in any event does not merit plenary review.

3. Graff contends that the newsstand ordinance is an invalid prior restraint because it creates "the vice of standardless discretion." Pet. 17. The court below, however, correctly concluded that because the ordinance does not delegate to a licensing official discretion to act on the basis of the content of protected speech, much less "unbridled" discretion, it is not an unlawful prior restraint.

Graff is correct that the ordinance vests a modicum of discretion in the Commissioner of Public Works to decide how many newsstand permits to issue and how to evaluate applications under the criteria contained within the ordinance. The mere existence of discretion, however, does not create a prior restraint if the discretion conferred does not permit a licensing official to act on the basis of the content of protected speech. That has been clear at least since *Cox v. New Hampshire*, 312 U.S. 569 (1941), in which the Court upheld an ordinance requiring a permit for parades. The Court reasoned that a city may exercise discretion when evaluating a request to engage in protected activity on the public ways as long as that discretion is limited to regulating the time, place, or manner of speech. See *id.* at 574-76. See also *Heffron*

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[6] Graff contends that *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991), held that procedural safeguards are required even in the absence of standardless discretion, but the court there did no such thing. It struck down a newspaper vending machine permit system because it created "completely standardless and unfettered discretion" (*id.* at 1199), and held only that "some minimal procedures and standards are required to channel the discretion of [the] officials." *Id.* (footnote omitted).

v. International Society for Krishna Consciousness, 452 U.S. 640, 647 n.10 (1981). Thus, an individual may not "challenge as censorship any law involving discretion to which [he] is subject. The law must have a close enough nexus to expression . . . to pose a real and substantial threat of the identified censorship risks." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. at 759. This nexus does not exist when a licensor can consider only the time, place, or manner of communicative activities. Rather, it is present only when a licensing authority has such broad discretion that it may act on the basis of the content of an applicant's speech: "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Id.* at 757. Accord, *e.g.*, *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2402-03 (1992); *FW/PBS*, 493 U.S. at 225-26 (plurality opinion); *Shuttlesworth v. City of Birmingham*, 394 U.S. at 151.

Neither of the two aspects of the Commissioner's discretion about which Graff complains has any nexus to expression. There is no threat of censorship in the decision how many permits to issue. See Pet. 18-19. The Commissioner must decide whether to make permits available before he even receives applications, and applicants are not required to identify the periodicals they will sell at a proposed newsstand in their applications.[7] Thus the Commissioner has no vehicle for reviewing the content of periodicals to be distributed at a newsstand. Similarly, the Commissioner's discretion to determine "whether the design, materials, and color scheme of the newsstand comport with and enhance the quality and character of the streetscape, including nearby development and existing land uses," provides no authority over the content of periodicals. Pet. 19 (citing ordinance). This and the other binding criteria hardly afford "unbridled discretion."

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[7] What is more, since most applicants will not be operating a newsstand at the time they apply, it will not be possible to visit the stand and determine what periodicals the applicant is distributing.

And once an applicant receives a permit, it is entitled to renewal as long as the newsstand remains in compliance with the law. In particular, permits cannot be revoked to punish applicants for distributing disfavored materials. Thus, the ordinance does not permit the Commissioner to exercise "unbridled" or "censorial" power.

Moreover, the two particular aspects of the ordinance to which Graff objects are amply justified by legitimate and content-neutral governmental interests. The City's aesthetic interest in avoiding visual clutter on its public ways is unquestionably legitimate (*e.g., Taxpayers for Vincent*, 466 U.S. at 805-07, 810, 816-17), and is plainly broad enough to comprehend the Commissioner's power to assess the design of a newsstand. If the Commissioner somehow learns which applicants intend to distribute disfavored publications—whatever they are—and uses the aesthetic criterion as a pretext for denying all these applications, that pattern will quickly become evident.

Similarly, a cap on the number of permits also serves the City's interest in reducing visual and physical clutter on its property. The Commissioner had discretion to decide how many permits he will issue; the decision is made before he even knows the identity of an applicant; and hence cannot be based on the content of protected speech. And what is more, the validity of the permit cap or the way it is set is immaterial to the disposition of this case. Graff applied for permits for two newsstands at the Chicago Cultural Center, a landmarked building. Those applications were denied not because no further permits would be issued, but because the Commission on Chicago Historical and Architectural Landmarks determined that a newsstand at that location would compromise the architectural integrity of the Cultural Center. Pet. App. 5.[8] Accordingly, Graff cannot obtain the in-

[8] Graff has never attacked the Commission's decision or mounted any other type of challenge to the ordinance as applied to him. He has only attacked the ordinance on its face.

junction at issue by challenging the permit cap. His applications were denied without reference to that limitation, and a litigant may not obtain an injunction unless it identifies an injury it has suffered as a result of the challenged conduct that will be redressed by a favorable decision. See, *e.g.*, *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). Graff's newsstand would have to be removed even if he succeeded in invalidating this aspect of the ordinance, and thus this feature of the ordinance provides no basis for reversing the judgment below denying Graff injunctive relief.[9]

In short, the newsstand ordinance is not an unlawful prior restraint. It contains no "unbridled discretion," no avenue for the Commissioner to review the content of materials distributed at newsstands, and no mechanism for revoking or failing to renew a permit if an applicant distributes a disfavored publication. Indeed, a newsstand ordinance can never be much of a device for censorship. Since newsstands are not identified with any particular publication, denying permits for all newsstands that carry a particular disfavored publication is "too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Lakewood*, 486 U.S. at 761. Such a course of action would hardly be practical, and its motivation would quickly become apparent.

As we point out above, the courts of appeals have uniformly held that when an ordinance limits the discretion of licensing officials to act on the basis of content, it should not be analyzed as a prior restraint. The binding criteria in the ordinance do just that. While Graff cites *Miami Herald Publishing Co. v. City of Hallendale*, 734 F.2d 666, clarified, 742 F.2d 590 (11th Cir. 1984), he does not argue that that decision is inconsistent with the holding below (see Pet. 22), and indeed it is not. In that case, the court struck down a permit scheme governing newspaper vending machines because the ordinance

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[9] The ordinance contains a comprehensive severability clause. See Municipal Code of Chicago, Ill. § 10-28-192 (1991).

was so vague that applicants could not determine with which provisions of the city's code they would be expected to comply. See 734 F.2d at 674-75. Graff has never forwarded any such attack against the ordinance at issue here.[10] The decision below accordingly is consistent with this Court's precedents, creates no conflict in the circuits, and is ultimately based on the quite specific aspects of the particular ordinance at issue. There is accordingly no basis for this Court's plenary review.

4. Graff argues that the court below should have sustained his challenge to the ordinance through some form of heightened judicial scrutiny applicable under the Equal Protection Clause because the ordinance "burdens the exercise of a fundamental right." Pet. 23. The Equal Protection Clause, however, "requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right. . . ." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1975) (per curiam). Once the court below determined that the ordinance was consistent with the First Amendment, and contained only reasonable regulations of the time, place, and manner of expressive activity, it follows that the ordinance is sufficiently rational to survive equal protection scrutiny as well. See, *e.g.*, *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 344 n.9 (1986); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 42, 55 n.4 (1986).

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[10] Graff also cites two other decisions (see Pet. 22), although the proposition for which they are cited is unclear. In *Leonardson v. City of East Lansing*, 896 F.2d 190 (6th Cir. 1990), the court condemned an ordinance that gave the police broad discretion to prevent demonstrations or other public gatherings that posed no imminent threat of unlawful activity. See *id.* at 197-99. In *Beckerman v. City of Tupelo*, 664 F.2d 502 (5th Cir. Unit A 1981), the court invalidated a similar ordinance granting licensing officials the power to deny parade permits because of their fear of unlawful activity, again without any imminent likelihood of such activity. See *id.* at 509-10. Plainly, neither holding is inconsistent with the decision below.

To support his claim of unconstitutional discrimination, Graff contends that the City treats applications for sidewalk cafes more favorably than newsstand permit applications. There is no factual support for that conclusion. No sidewalk cafe may open unless the City Council enacts an ordinance authorizing its operation, and the Council has unfettered discretion to refuse to enact the ordinance. See Municipal Code of Chicago, Ill. § 4-384-020 (1991). Even if an ordinance is enacted, the City's Commissioner of Consumer Services may refuse to issue a license if the proposed cafe interferes with pedestrian traffic or access to a building, threatens pedestrian and traffic safety, or is not aesthetically compatible with the surrounding area. See *id.* § 4-384-060. Thus, the ordinance leaves the City with far more discretion to deny a sidewalk cafe application than to deny a newsstand application. The City does not discriminate against newsstands.[11]

5. With respect to the court of appeals' analysis of the ordinance under time, place, or manner doctrine, Graff does not argue that the City's ordinance is not facially valid as a reasonable regulation of the time, place, or manner of speech; instead he argues that the district court should have held a hearing to assess the strength of the City's justifications for limiting the number and size of newsstands. See Pet. 27-28. Graff relies on *City*

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[11] The equal protection precedents on which Graff relies all concerned ordinances that allegedly violated the First Amendment. These courts applied heightened scrutiny only in analyzing the claim that the ordinance did in fact impermissibly infringe First Amendment rights. See *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 480, 494-96 (1986) (claim that city had unjustifiably prevented cable operator from doing business in violation of First Amendment); *Minneapolis Star & Tribune Co. v. Minneapolis Commissioner of Revenue*, 460 U.S. 575, 582-93 (1983) (state tax that discriminated against newspapers in violation of First Amendment); *Sentinel Communications Co. v. Watts*, 936 F.2d at 1206-07 (liability insurance requirement that discriminated against newsracks in violation of First Amendment).

of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986), in which the Court required the city to adduce evidence supporting its contention that it had a legitimate interest in permitting only one cable television company to lease space on utility poles. Thus, the Court required an evidentiary hearing because the need for limiting access to utility poles was open to fair dispute. See *id.* at 494. That is simply not true here.

In *Preferred Communications*, the city attempted to justify its refusal to permit Preferred to operate a cable television system on the basis that there was limited space on its utility poles, but there was a genuine dispute about how limited that space was. See 476 U.S. at 491. Hence the Court needed to "know more about the present uses of the public utility poles and rights-of-way and how [Preferred] proposes to install and maintain its facilities on them." *Id.* at 495. Here, the City has relied only on the indisputable proposition that more and larger newsstands add clutter to the public ways. As the majority below correctly held, this common sense conclusion is self-evident, and hence no evidentiary hearing need be held to prove the obvious. See Pet. App. 31-32. In *Taxpayers for Vincent*, for example, the Court upheld an ordinance prohibiting the placement of signs on utility poles without requiring a trial, writing that "we accept the City's position that it may decide that aesthetic interest in avoiding 'visual clutter' justifies a removal of signs creating or increasing that clutter." 468 U.S. at 816. The same is true here. More and larger newsstands unquestionably increase the problem of visual and physical clutter. Accordingly, there can be no fair dispute about whether the City's limitation on the number and size of newsstands directly advances its legitimate interest, which is all that is required to uphold an ordinance as a reasonable regulation of the time, place, or manner of speech. See, *e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 797-802 (1989). Nothing in *Preferred Communications*

requires a district court to hold a trial the outcome of which is foreordained.[12]

Graff also complains about the ordinance's requirement that newsstands distribute only periodicals, thereby excluding other "expressive materials" that Graff would like to sell. See Pet. 29. But again, the legitimacy of the City's interest is readily apparent. Requiring licensed newsstands to be newsstands in fact, and not mini-marts offering books, video tapes, T-shirts, and any other imaginable "expressive materials" plainly serves "the legitimate interest in 'preserv[ing] the property . . . for the use to which it is lawfully dedicated.' " *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 50-51 (1983) (quoting *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 129-30 (1981)). See also *International Society for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2706 (1992). Moreover, as the court below correctly concluded, the availability of all manner of "expressive materials" at newsstands would result in more time-consuming purchases and more obstruction of pedestrian traffic flow. See Pet. App. 26.[13]

Not only is there no disagreement in the lower courts on this issue, but even the dissenting judges below did not fault the district court for failing to hold an evidentiary hearing. And in any event, the validity of the re-

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[12] *754 Orange Ave. v. City of West Haven*, 761 F.2d 105 (2d Cir. 1985), is distinguishable for the same reason as *Preferred Communications*. There it was fairly open to dispute whether adult bookstores had the adverse effects on the surrounding community that the city claimed. See *id.* at 111.

[13] Graff cites *Gaudiya Vaishnava Society v. City and County of Dallas*, 952 F.2d 1059 (9th Cir. 1990), cert. denied, 112 S. Ct. 1951 (1992), but that decision is far afield. There the court held only that a permit scheme governing the sale of items for charitable purposes was invalid because it gave "unbridled discretion" to the chief of police to decide whether to issue permits. See *id.* at 1062-63, 1065.

strictions on what may be sold at a newsstand is immaterial to the disposition of this case. As we point out above, Graff's applications were denied because of the impact of the proposed newsstands on the adjoining landmarked property, and not because of what he wished to sell. Thus, invalidation of this aspect of the ordinance would not entitle Graff to the injunction at issue in this case. This issue provides no basis for plenary review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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